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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1124

UNITED STATES OF AMERICA, PETITIONER

v.

W. M. WEBB, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 314–337) is reported at 271 F. Supp. 249. The opinion of the court of appeals (R. 357–365) is reported at 402 F. 2d 956.

JURISDICTION

The judgments of the court of appeals were entered on November 6, 1968. (R. 338–351.) After an extension of time, the petition for a write or certiorari was timely filed on March 6, 1969, and was granted on April 28, 1969. The jurisdiction of this court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the captains and crews on fishing boats are employees of the boat owner for the purpose of the Federal Insurance Contributions Act, 26 U.S.C. 3121 *et seq.*, and Federal Unemployment Tax Act, 26

U.S.C. 3306 *et seq.*, when they are engaged under the so-called "lay" or similar system whereby the captain has discretion in hiring and firing the crew and the captains' and crews' compensation is measured by the volume of the catch.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of Sections 3111, 3121, 3301, and 3306 of the Internal Revenue Code of 1954 and Sections 31.3121(a)–1, 31.3121(d)–1, 31.3306(b)–1, and 31.3306(i)–1 of the Treasury Regulations on Employment Tax are printed in the Appendix, *infra*, pp. 39–45.

STATEMENT

The fourteen respondents in these five cases are engaged in the business of fishing for menhaden.[1] Each owns one or more boats which fish for the menhaden both in the Atlantic Ocean and Gulf of Mexico. The vessels ranged in length from 85 to 150 feet and their cost varied between $24,000 and $157,000, depending upon age and size. (R. 58, 152, 318.) Respondents sell the catch to fish processing plants.[2] (R. 126–127, 317.)

[1] Menhaden fish are processed into fish meal and a fish "soluable," which is used for commercial feed. It is also processed into fish oil for use as a base in paints. During World War II, the fish were prepared for eating and exported to Russia. It has also been used to prepare an oil used in Europe for the manufacture of margarine. (R. 85–87).

[2] The boats operated from docking facilities owned by the processing plants. During the taxable periods the processing plants were separate and distinct operations. However, individual shareholders of the corporate respondents held shareholder interests in some of the processing companies. (R. 82–84, 150, 318–319.)

Each respondent operates in substantially the same manner. The owner fully equipped his vessels for menhaden fishing, and made and paid for all repairs and insurance on the boats (R. 57, 110, 113, 114, 156, 187, 301–302, 319). He would then secure the services of an experienced fisherman to be captain of the vessel. A captain was generally selected because the respondent had confidence in his honesty and integrity, and had trust in his ability to select, organize, and supervise a crew to operate the boat and conduct successful fishing operations (R. 63, 90–92, 93, 319). No special license or papers were required to become a captain. (R. 101, 133.) Once a captain was selected, it was only necessary for him to register as captain of a boat with the Bureau of Customs. (R. 62, 63, 319, 320–321.) The captains hired and fired the crew and supervised and controlled the crew's activities at sea (R. 92, 99–101, 108, 124, 153, 162–163, 178–179, 182, 204, 217–218, 224, 246, 264, 323, 324).

The arrangement between captain and owner was oral and had no specified term. In custom and practice it lasted an entire season. Some captains fished consecutive seasons for the same owner. Each of the seven captains whose testimony is in the record worked for one owner for periods—having some short interruptions—ranging from 15 to 40 years (R. 162, 174–175, 213, 221, 231, 244, 262–263). However, nothing in the arrangement assured any captain the use of a particular boat, or in fact any boat, beyond a single fishing season (R. 63, 101, 122, 133–135, 153, 162, 174, 176, 193–194, 210–213, 215, 221, 231–232, 244, 253–254, 320, 321, 322). Each season was the subject

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of new and separate negotiations between boat owners and captains (R. 101, 133–134, 320). Although there have been instances of captains leaving one owner to work for another, respondents consider it "good business" not to "raid" each other's fleet (R. 123–124).

The relationship could be terminated at any time, voluntarily or involuntarily, by owner or captain; in practice this would occur when the boat was in port at the conclusion of any fishing trip. An owner would dismiss a captain who endangered the personnel, damaged property, failed to produce adequate catches, was charged with a crime, or otherwise failed to give what the owner considered satisfactory performance. (R. 63, 67, 99–100, 101, 102, 103–104, 111–112, 252, 299–300, 320).

After a captain was selected, the boat was turned over to him. He then registered the boat and himself with the Bureau of Customs, as required by federal law (R. 320). The owner fixed the number of crewmen to be paid. Subject to the owner's disapproval, the captain could sail with fewer men. He could, on his own, hire more men. In either event, the amount the owner had allotted to the crew would not be changed. Rather, the money would be split among fewer or more men (R. 117–118, 166, 171, 189–190, 214–215, 235–236, 238, 259, 265–266, 323). The captain selected the men he desired to compose his crew. Aside from himself, the boat's crew consisted of a mate, pilot, engineer, cook and about 20 net handlers during the taxable period in issue (R. 152–153, 323).

Respondents also fixed the pay scale of the crew. (R. 96–97, 98–99, 180, 187, 197, 232, 235, 323.) Respondents paid their captains at an agreed dollar amount per unit[3] of fish caught and delivered to the fish processing plants, generally two dollars to three dollars for each 1,000 fish caught[4] (R. 95, 153–154, 181, 249, 277–278, 326). In addition, respondents agreed to pay a bonus for each unit of fish caught. The bonus was divided among the captain and crew at the conclusion of a fishing season on a basis negotiated between the captain and each crew member, and was generally earned only by crewmen who stayed on until the end of the fishing season. R. 94, 96, 132, 138–140, 144–145, 190–191, 207–208, 226, 234, 252–253, 326–327.) A failure to produce a catch resulted in no remuneration to the captain and crew (R. 65, 218, 240, 241, 326, 331).

Before the beginning of each fishing season, captains were given a "paysheet" setting out the amount which in respondents' estimation should be paid the individual crewmen under the captain (R. 96–97, 98–99, 164, 206–207, 225, 234, 235, 248, 264, 323). Respondents required the captains to prepare and turn in bi-weekly payroll records and annual income tax withholding forms and social security tax forms for their crews. Each captain, in turn, kept daily payroll records for his crew. (R. 104–106, 164–165, 188–189,

[3] The unit of measurement, 1,000 fish, was the average volumetric content of an unloading device at the processing plants. The unit generally weighed around 660 pounds. (R. 75–76.)

[4] A new and complete set of personal and financial records was kept for each boat for each new season by the processing plant from which the boat operated (R. 322).

225–226, 250, 322, 327, 328–329.) The processing plant prepared a tally sheet after each fishing trip, showing the volume of the catch, and the captains prepared a payroll settlement sheet for each boat (R. 104–105, 154–155, 164–165, 328–329). Respondents issued bi-weekly payroll checks. The checks were delivered to the captains who, in turn, distributed them to the crew (R. 104–106, 157, 188–189, 209–210, 250, 328–329).

The actual fishing season for menhaden varied according to the area where the fish were running (R. 72–74). It usually began in the Gulf about April 15 and concluded about October 1. Along the Atlantic seaboard, the summer season ran from about May 15 to September 15 and winter fishing ran from November 1 through January 15. The respondents would decide the location where each captain would fish, a decision that depended on both the availability of fish and the owner's judgment of the particular captain's abilities.[5] Some boats and captains moved back and forth between fishing grounds to take advantage of the staggered seasons (R. 57–58, 72–74, 175–176, 321). Each fishing trip usually lasted a single day and was taken in the vicinity of the processing plants to facili-

[5] The decision was guided by the seasonal presence and availability of menhaden. If a respondent had an option of two places to fish, the captain's preference was a factor in the ultimate decision (R. 185–187, 227–228, 332). The captains chose the fishing spots either by guidance of spotter planes, supplied by processing plants, or upon the recommendation of other captains who had already located a good fishing area. A two-way radio on board the vessels provided the means to make contact with these information sources. (R. 59, 183–184, 200–201, 205, 234, 251–252, 332–333.)

tate immediate unloading of the catch. (R. 74, 81, 151, 156, 163, 330.)

In addition to determining the general area to be fished, respondents designated the processing plants to which the catch was to be delivered. (R. 92–93, 107, 151, 163, 169, 185–187, 205–206, 226, 227, 232, 233, 247, 250–251, 265, 317, 320, 321, 331.) Once the trip was commenced, the captain was in full charge of the boat; he decided when to start and terminate a trip and the precise spot to be fished. (R. 64, 163–164, 183–184, 222–225, 234, 251–252, 324.)

Respondents required that intoxicating liquors not be taken aboard the boats, established restricted areas which were not to be fished, and required the captain to keep the boat clean, to keep the engines in working order, and properly to moor and to watch the boat while in port (R. 116–117, 124, 325). They had the right to control the captain's work, and did so as each thought necessary to assure a favorable result from the undertaking (R. 333).

The crew paid for the cost of their groceries for each trip and for their own foul weather gear. Respondents paid for the cost of fuel and advanced money to the captain to pay for groceries and other needs. Respondents bore the risk of loss if the crew failed to earn enough over the season to pay for the groceries. (R. 65, 109, 110, 112–113, 116, 159, 169, 187–188, 189, 208–209, 240, 254–255, 328, 332). Respondents also paid the captains' and crews' transportation expenses when they had to travel from North Carolina to Louisiana (R. 182, 233, 241, 247, 323).

Respondents filed Federal Insurance Act and Fed-

eral Unemployment Act tax returns for the periods in issue and paid the employer's share of the taxes due on the earnings of the captains and crews. Claims for refund were timely filed, and, after the expiration of six months, respondents commenced these refund suits in the district court. (R. 19, 26, 32, 38, 43, 334.) That court held that the respondents were not employers of the captains and crews (R. 336–337). On the government's appeal, the Fifth Circuit affirmed (R. 356, 366). The petition for a writ of certiorari was granted on April 28, 1969 (R. 367).

SUMMARY OF ARGUMENT

The Federal Insurance Contributions Act and Federal Unemployment Tax Act define an employee as any individual who, under the usual "common law rules" applicable in determining the employer-employee relationship, has the status of an employee. Those rules require examination and evaluation of a variety of factors, which have been enumerated in the pertinent Treasury Regulations and court decisions. These include the right to control the work, the relative degree of investment in the enterprise by the purported employer and the purported employees, the furnishing of tools and a place to work, the opportunity for profit or loss, the mode of payment, and the permanency of the relationship.

Congress has made clear that there should not be a rigid or narrow application of these standards. Rather, Congress expressly urged a "realistic" application of these rules as they were expressed by this Court in *United States* v. *Silk,* 331 U.S. 704, and

Bartels v. *Birmingham,* 332 U.S. 126. Congress also has, on two occasions, cautioned that "A restricted view of the employer-employee relationship should not be taken in the administration of the Federal old-age and survivors systems in making coverage determinations." H. Conf. Rep. No. 2771, 81st Cong., 2d Sess., p. 104, quoting from the legislative history of the Social Security Amendments of 1939.

I

Any realistic application of the common law rules to the relation between boat owners and their fisherman should be based on that particular body of law which governs the unique undertaking of menhaden fishing. It takes place on the high seas, and requires a master on board the vessel, to command its crew and control its course. Maritime law, which the courts below refused to consider, is the body of laws which govern every aspect of the operation, and is the proper means of analyzing the relationship of the owner to the fishermen who operate his boats. Otherwise, the general purposes of the Social Security and unemployment legislation and the manifest Congressional intent to apply these statutes to fishermen working on larger boats will be frustrated.

Under maritime law, the captains and crew are in an employment relationship with the respondents, and the court of appeals so acknowledged. Under settled principles, the boat owner is the employer of captain and crew unless the master of the vessel has become owner *pro hac vice* by a demise charter. For a demise charter to exist, the owner must surrender

the entire possession, control, and navigation of the vessel, which respondents clearly did not do. When, as here, the undertaking is for the general interest of the owner, the master of the vessel is his agent, the acts of the master are those of the owner, and the owners—here the respondents—employ the captain and crew.

This conclusion accords with the rules that generally control the liability of a ship owner to the men who sail his vessel and to third parties under the rule of *respondeat superior*. An administrative interpretation which the Treasury has adopted in implementing its duties to collect these taxes, S.S. T. 387, 1940–1 Cum. Bull. 192, and which the Social Security Administration follows in implementing its duties to determine eligibility for benefits, takes the same position. The deference due these long-standing administrative positions alone requires reversal of the decision below. *E.g., United States* v. *Correll*, 389 U.S. 299, 305–306; *National Labor Relations Board* v. *United Insurance Co.*, 390 U.S. 254, 260.

II

Even if the principles of general maritime law are not applied here, the captains and crews should be adjudged the employees of respondents. Paramount, although not exclusive, in this determination, is respondents' ultimate control over the entire operations. An owner could fire a captain at any time during the fishing season for any reason the owner deemed satisfactory. The owners determined what boats the respective captains were to command, the general geographic area they were to operate in, and the disposition of the catch. By completely outfitting the boats, the

owners effectively limited the means available for catching menhaden. The owners issued a pay scale to the captains at the inception of each season, and also issued directives as to the size of the crew.

The fact that respondents were the entrepreneurs also shows that they were the employers. The captains and crews had no opportunity to participate in the profits; they were paid on a piece-work basis. Respondents made the capital investment and paid for repairs and operating costs. Although the fishermen did not have a continuous working relationship with the owners, captains did remain with the various respondents for periods ranging up to forty years. During the fishing season, respondents employed bonuses as a means of retaining the services of fishermen. In these respects, there is no discernible difference between menhaden fishing and any other seasonable business.

All these facts show the existence of an employment relation and entirely fail to support the contrary conclusion of the courts below.

III

The court of appeals thought that its review of this case was limited by the "clearly erroneous" standard. But there is no dispute with respect to the underlying facts here. Although the case involves a so-called "mixed" question of fact and law, the inquiry on review is the application of a legal standard to undisputed facts. In such a posture, the issue for review is basically one of law and permits plenary appellate

review. This Court's analysis in *United States* v. *Silk, supra,* and *Bartels* v. *Birmingham, supra,* supports this conclusion. *National Labor Relations Board* v. *United Insurance Co., supra,* provides even more direct authority for this view. And the contrary conclusion would be entirely inconsistent with the expectation of the Congress that there would be nationwide uniformity in the application of these laws.

ARGUMENT

INTRODUCTION

The ultimate problem here is to determine whether respondents are liable for the employers' share of Social Security and federal unemployment taxes on the earnings of the captains and sailors who man respondents' fishing boats. This, in turn, depends upon the proper characterization of the relationships between the owner, the captain, and the crew.

In point of theory, the captains could be employees of the owners, joint venturers or independent contractors. The crewmen could be employees of either the owner or the captain. Analysis begins with the Federal Insurance Contributions Act and Federal Unemployment Tax Act, which impose excise taxes upon the "employer," measured by the "wages" paid his employees. Sections 3111 and 3301, Internal Revenue Code of 1954 (Appendix, *infra* pp. 39–40).[6] In turn,

[6] The term "wages" is defined in Sections 3121(a) and 3306(b) (Appendix, *infra* pp. 39, 40), with exceptions not here relevant, as "all remuneration for employment". The term "employment" is defined in Section 3121(b), and Section 3306 (c) as "any service * * * of whatever nature, performed * * * by an employee for the person employing him * * * on or in connection with an American vessel * * *."

"employee" is defined in Section 3121(d)(2) of the Code for purposes of the Federal Insurance Contributions Act as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee". Although phrased somewhat differently, Section 3306(i)(1) also refers to the "usual common law rules applicable in determining the employer-employee relationship" in defining "employee" for the purposes of the Federal Unemployment Tax Act.

Thus, Congress has determined that the existence of an employment relationship, and consequently respondents' liability for the employers' FICA and FUTA taxes, should be determined according to the rules of the "common law". This means that the tests generally used when liability depends on the existence of an employment relationship—as in applying the doctrine of respondeat superior or in determining liability for workmen's compensation—control here.

Section 31.3121(d)-(1)(c)(2) of the Treasury Regulation on Employment Tax (1954 Code) (Appendix, *infra* pp. 42–43) implements the statutory definition. It provides:

> Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is

> subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. * * *

See, also, Restatement of the *Law of Agency* (2d ed.), Section 220. The Regulation recognizes other factors as characteristic of an employer-employee relationship, but not necessarily present in every case: the right to discharge; the furnishing of tools and furnishing of a place to work to the individual to perform the services; the opportunity for profit or loss by the alleged employee; the degree of skill required in the occupation; the permanency of the relationship; and the mode of payment. See *United States* v. *Silk*, 331 U.S. 704; *Enochs* v. *Williams Packing Co.*, 370 U.S. 1; *Illinois Tri-Seal Products, Inc.* v. *United States*, 353 F. 2d 216 (Ct. Cl.); and *Kirkconnell* v. *United States*, 347 F. 2d 260 (Ct. Cl.).

These general criteria of the common law, which the Regulations describe, must be interpreted and applied in a practical fashion to each case. The common law is neither static nor stultified as of any particular time, but adapts itself to a broad variety of basic conditions. Congress plainly intended this concept of an evolving common law to be used in Social Security matters. In recommending the predecessor

of the current statute,[7] the Senate Committee approved (S. Rep. No. 1255, 80th Cong., 2d Sess., pp. 1-2, 7) this Court's decisions in *United States* v. *Silk, supra,* and *Bartels* v. *Birmingham,* 332 U.S. 126, stating (S. Rep. 1255, *supra,* at p. 7):

> In the view of your committee these decisions affirm that the usual common-law rules, realistically applied, must be used to determine whether a person is an "employee" for purposes of applying the Social Security Act.

When the statute was amended again in 1950,[8] the conference report took the opportunity to quote language previously used in connection with the Social

[7] Section 1, Joint Resolution of June 14, 1948, c. 468, 62 Stat. 438, amending Sections 1426(d) and 1607(i) of the Internal Revenue Code of 1939. These amendments were made retroactive to August 14, 1935, with respect to the Social Security Act, and to February 10, 1939, with respect to the Internal Revenue Code of 1939.

Prior to 1948, the statute (Sections 1426(d) and 1607(i) of the Internal Revenue Code of 1939) merely provided that "the term 'employee' includes an officer of a corporation." Treasury regulations drafted in an attempt to clarify this vague provision resulted in conflict and inconsistency with which this Court dealt in *Silk* and *Bartels*. Out of concern that regulations proposed after these decisions would extend the Act, Congress added an express reference to the "common law rules" in 1948. See H. Rep. No. 1319, 80th Cong., 2d Sess., pp. 1-4; S. Rep. No. 1255, 80th Cong., 2d Sess., pp. 1-13; 94 Cong. Rec., Part 2, pp. 1893-1894.

[8] Section 205(a) of the Social Security Act Amendments of 1950, c. 809, 64 Stat. 477.

Security Amendments of 1939 (H. Conf. Rep. No. 2771, 81st Cong., 2d Sess., p. 104):

> "A restricted view of the employer-employee relationship should not be taken in the administration of the Federal old-age and survivors insurance system in making coverage determinations. The tests for determining the relationship laid down in cases relating to tort liability and to the common-law concept of master and servant should not be narrowly applied. * * *"[9]

These interrelated congressional admonitions—that the statute is to be "realistically applied" and that a "restricted view" is to be avoided—have an essential part in this case. We contend—and later in this brief we shall argue (pp. 25–31, *infra*)—that the captains and crewmen are respondents' employees however narrowly the statutory definition of employee is interpreted. But our principal position, and the point that gives rise to the conflict between the Fifth Circuit's decision here and the Court of Claims' application of the statute in *Cape Shore Fish Co.* v. *United States*, 330 F. 2d 961, involve the relevance of maritime law to this case. Throughout this proceeding, we have urged that the employer-employee relationship should be evaluated according to the general principles of maritime law that are traditionally applied in the context of seafaring operations. Both lower courts categorically refused to do so, although the court of appeals observed that if it were free to apply maritime

[9] The legislative history of the amendments is discussed in *United States* v. *Thorson*, 282 F. 2d 157, 159 (C.A. 1); *Ringling Bros.-Barnum & Bailey Com. Shows* v. *Higgins*, 189 F. 2d 865, 868–869 (C.A. 2); and *Party Cab Co.* v. *United States*, 172 F. 2d 87, 89–91 (C.A. 7).

law it would reverse the decision of the trial court (R. 362).

We first turn to this question, contending in Point I of this brief that the lower courts' refusal to consider maritime law requires reversal of its decision. This we submit, is the realistic, nonrestrictive reading of the statute. In Point II of this brief we contend that the same result should follow even though principles developed with respect to land based operations are applied in determining the application of the "common law rules" to the construction of the word "employee."

I. THE "COMMON LAW RULES" APPLICABLE IN THE DETERMINATION OF THE RELATIONSHIP BETWEEN BOATOWNERS AND FISHERMEN FOR SOCIAL SECURITY PURPOSES INCLUDE GENERAL PRINCIPLES OF MARITIME LAW, THE COMMON LAW OF THE SEA

As the Treasury Regulations make clear, application of the "common law rules" in determining whether a given circumstance constitutes an employer-employee relationship requires evaluation of a variety of factors. "As stated in *United States* v. *Silk,* 331 U.S. 704, 716, 'degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required * * * are important for decision * * *'." *Enochs* v. *Williams Packing Co.,* 370 U.S. 1, 3; compare *National Labor Relations Board* v. *United Insurance Co.,* 390 U.S. 254. Although all of these factors are significant, the most important is the degree of control that the purported employer may exercise over the purported employees. Indeed, in this case

the relative discretion the fishing boat captains have over the hiring and firing of crews, the fishing schedules, and the shipboard activities was the most important element in the decision of the Fifth Circuit to sustain the result the trial court reached in this case (R. 361).

It is plain, however, that the significance given the captain's discretion depends on the standards by which his function is judged. Although the captain does not have complete control of these matters, is restricted by metes and bounds established by the owner, and in many respects is subject to the veto of the owner, his discretion is unusually broad if it is compared to many land-based industries. However, most of his discretion is necessarily dictated by the nature of the activity—that it takes place away from the shore—and the owner's ability to exercise control has always been severely limited. But this is true of every maritime activity. Under maritime law, this relative lack of direct control has never allowed the boat owner to escape the duties that the maritime employer owes to his employees—as for example in providing maintenance and cure. It is well established in the maritime cases that these obligations exist except when there is a bareboat, or demise, charter. See, *e.g., The Norland,* 101 F. 2d 967 (C.A. 9); *Cromwell* v. *Slaney,* 65 F. 2d 940 (C.A. 1); *The Carrier Dove,* 97 Fed. 111 (C.A. 1); *Justillian* v. *Versaggi,* 169 F. Supp. 71 (S.D. Tex.). The same is true of the other factor here which supports the argument that the crewmen are not respondents' employees—their method of compensation. See, *e.g., Hudgins* v. *Gregory,* 219 F. 2d 255 (C.A. 4); cf. *Guzman* v. *Pichirilo,* 369

U.S. 698. In fishing industries compensation on a share or "lay" basis does not make the recipient a joint venturer or partner; such compensation is still considered wages. See *Thomas* v. *Osborn,* 19 How. 22; *United States* v. *Laflin,* 24 F. 2d 683 (C.A. 9); *Old Point Fish Co.* v. *Haywood,* 109 F. 2d 703 (C.A. 4); *Vitco* v. *Joncich,* 130 F. Supp. 945 (S.D. Calif.) affirmed, 234 F. 2d 161 (C.A. 9); see, generally, Gilmore and Black, *The Law of Admiralty* (1957) 256–257. In the *Vitco* case Judge Mathes summarized the law in these words (130 F. Supp. at 949–950):

> From the earliest times the seaman's share in the proceeds of the voyage has been considered "as in the nature of wages." *Harden* v. *Gordon,* 11 Fed. Cas. at page 481, No. 6,047. "Although seamen in whaling (fishing) voyages are compensated by shares of the proceeds, this compensation is always treated as in the nature of wages. They are never deemed partners * * * the very nature of the service excludes the notion of partnership. It would defeat the very objects of the parties." Story, J. in Reed v. Canfield, supra, 20 Fed. Cas. at page 429, No. 11,641; 3 Kent's Commentaries, 34 (8th ed. 1844).

The captains are not charterers of respondents' vessels.[10] Therefore, as the Fifth Circuit recognized (R.

[10] For such a charter to exist, the entire possession, control, and navigation of the vessel must be surrendered. See, *e.g.*, *Peters* v. *Rohrman,* 272 Fed. 338 (D.N.J.). Anything less than a transfer of the entire possession, control, and navigation of the vessel will not amount to a demise charter. The burden of establishing a demise charter is heavy, and this Court declines to find a demise relation when the dealings between the par-

362), respondents would be liable for the employers' share of the FICA and FUTA taxes if their relationship to the captains and crewmen is gauged by the traditional standards of maritime law.

The choice, then, is between two quite different interpretations of the phrase "common law rules" as used in the Social Security and federal unemployment legislation. One, which the Fifth Circuit adopted, would look at the "common law" in a highly technical sense, and use only those standards of land-based industries which were historically subject to the jurisdiction of "common law" courts. The other is that applied by the Court of Claims; in essence it interprets the phrase "common law rules" in a generic rather than technical sense, and, in a maritime situation, recognizes the realities of the sea, and relies on those principles of maritime law which have traditionally been the "common law" of seafaring men, though developed and applied in "admiralty."

Nothing in the legislative history fairly ascribes to Congress the anomalous intent of having maritime activities subject to standards, for Social Security purposes, other than those which are relevant to enterprises conducted at sea. Rather, we should sup-

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ties are consistent with a lesser relationship. *Guzman* v. *Pichirilo*, *supra*, 369 U.S. at 700.

It is clear that the arrangement between respondents and their captains here did not constitute demise charters. The testimony of Styron (R. 127) that none of the respondents chartered their vessels for a season to a captain or someone else clearly establishes that fact. So does the fact that the captains were obliged to return their catch to processing plants designated by, and for the account of, the respondents (R. 317–318, 320–321).

pose Congress intended the employer-employee relationship to be evaluated according to the standards that have been traditionally applied in the context of a particular industry. "A realistic application is to be made of the common-law rules pertinent in determining the employer-employee relationship, and the terms 'employment' and 'employee' are to be construed, not in a restricted sense, but so as to accomplish the purposes of the legislation involved". *Westover* v. *Stockholders Publishing Co.*, 237 F. 2d 948, 951 (C.A. 9). Were this approach not taken here, it would be impossible to conclude in the usual case that a seaman is the employee of a boat owner unless the owner happens to act as captain for the voyage.

Congress quite clearly thought that the FICA and FUTA legislation would apply to seamen. The term "employment" is defined (Section 3121(b) and Section 3306(c)) as "any service * * * of whatever nature, performed * * * by an employee for the person employing him * * * *on or in connection with an American vessel* * * *." (emphasis supplied) (see p. 12, n. 6, *supra*). And Congress just as plainly intended the legislation to cover fishermen, for Section 3306(c)(17) of the Social Security Act, 26 U.S.C. 3306(c)(17), exempts fishermen from Social Security coverage, except when on ships over ten tons in displacement. The inference is clear that Congress was of the view that "common law rules" would be applied to ships of the greater tonnage.

This congressional expectation would be severely frustrated if ship owners were relieved of responsi-

bilities for Social Security taxes unless their relationship with the captians and sailors were such as would give rise to an employer-employee relationship in a land-based activity. If the owner did not have the burdens the Social Security laws place upon the "employer," then the captain would have them, for he would then necessarily be the "employer" of the crewmen. But this would be the same as imposing, in a land based industry, the liability for Social Security taxes on the manager of one plant of a large corporation. It would represent a wholly unrealistic placement of the liability, and it would represent the type of restrictive view of the scope of Social Security legislation that Congress on two occasions warned against. See pp. 15–16, *supra*.

The Fifth Circuit's decision here is contrary to a long standing Treasury interpretation set forth in S.S.T. 387, 1940–1 Cum. Bull. 192.[11] That ruling, which the Social Security Administration has accepted for purposes of paying benefits to claimants, holds that the boat owner is the employer of captains and crewmen on fishing boats operated under terms and conditions essentially similar to those of record in this case. This ruling is not to be lightly rejected. First, as a long standing administrative interpretation, it comes within the rule that "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect

[11] S.S.T. 387 was not cited to the court of appeals.

of law."[12] *United States* v. *Correll,* 389 U.S. 299, 305-306; *Fribourg Nav. Co.* v. *Commissioner,* 383 U.S. 272, 283; *Helvering* v. *Winmill,* 305 U.S. 79, 83. Of equal importance, the Social Security Administration has accepted the same interpretation in implementing its duties to determine who is eligible for benefits. This is also entitled to the deference paid administrative determinations, even though no special administrative expertise is involved. *Natonal Labor Relations Board* v. *United Insurance Co., supra,* 390 U.S. at 260; see also, *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488.

These administrative interpretations are further confirmed by the interpretation ordinarily given words such as "employer" when used in maritime ventures. In nontax contexts, when courts are asked to determine whether seafarers are employees of the vessel's owner, they look to maritime law. The Jones Act (the Merchant Marine Act of 1920, c. 250, 41 Stat. 988, Section 33, 46 U.S.C. 688) grants a seaman a right to receive benefits if he is injured "in the course of his employment," and there is no further definition of "employment." In such cases, there has been uniform application of maritime law principles to the determination of whether an employee-employer relationship exists. See, *e.g., Justillian* v. *Versaggi, supra; Farmer* v. *O/S Fluffy D,* 220 F. Supp. 917 (S.D.

[12] Although the 1948 and 1950 amendments have intervened, they were not intended to change the rule in effect in 1940. On the contrary, the legislative history shows express approval of this Court's interpretation of the statute and regulations in existence in 1940. At all events, S.S.T. 387 has remained in force continuously since 1940, and the statutory language has been settled since 1950.

Tex.); *Moore* v. *The O/S Fram,* 226 F. Supp. 816 (S.D. Tex.), affirmed *sub nom. Wilhelm Seafoods* v. *Moore,* 328 F. 2d 868 (C.A. 5); *Quinn* v. *Porter,* 215 Miss. 314, 60 So. 2d 797; *Southern Shell Fish Co.* v. *Plaisance,* 196 F. 2d 312 (C.A. 5); *Hurgins* v. *Gregory,* 219 F. 2d 255 (C.A. 4). In these cases the owner is generally liable when the boat is not held under a demise charter. And the same is true of the owner's liability to third parties for the acts of the crew—*i.e.,* in the application of the doctrine of *respondeat superior* to maritime activities, the owner is liable unless there is a demise charter. See *The Barnstable,* 181 U.S. 464.

Furthermore, the Fifth Circuit's decision here portends consequences beyond the particular Social Security problem in issue. Indeed, if taken at face value, the decision below jeopardizes the application of the National Labor Relations Act to maritime industries. Although the Labor Act uses different language than the Social Security legislation, the effect is the same—to determine the presence of employer-employee relations according to the rules of the common law. See *National Labor Relations Board* v. *United Insurance Co., supra.* The duty to bargain and the other rights and obligations created under the Labor Act run between the employer and employee. In the seafaring context, it has, to now, always been thought that these obligations are present in dealings between the captain and crew on the one hand and the owner or demise charterer on the other.[13] But if the result below is correct,

[13] See the discussion of the union contracts in *Cape Shore Fish Co.* v. *United States, supra,* and *National Labor Relations Board* v. *Seine and Line Fishermen's Union of San Pedro,* 374 F. 2d 974 (C.A. 9).

then, presumably, it may be argued that there should be reevaluation of the manner in which the Labor Act is applied to persons such as the captain and crew with whom respondents deal.

II. RESPONDENTS ARE EMPLOYERS OF THE CAPTAINS AND CREW EVEN UNDER LAND-BASED CRITERIA

Even if the Court should reject the contentions set forth in the preceding section of this brief, we submit that the decision below should nevertheless be reversed. Taking land-based industries as the criteria for testing the relationship between respondents and the seamen on their boats, the undisputed facts of this record show an employment relationship.

As we have pointed out above, pp. 13–14, *supra,* the application of the "common law" test requires that a variety of factors be examined. These include the ability of the respondents to control the activities and hire and fire the captain and crew, the relative opportunity of respondents and their captains for profit or loss, the relative investment each party has, and the degree of permanence in the relationship. Of these the right to control is of particular importance.

These tests may be summarized as asking who, in the given situation, is the entrepreneur. Thus, many years ago, Judge Learned Hand, in oft-quoted language, said this in construing the term "employed" in an early employer's liability statute (*Lehigh Valley Coal Co.* v. *Yensavage,* 218 Fed. 547, 552–553 (C.A. 2), certiorari denied, 235 U.S. 750):

> It is true that the statute uses the word "employed," but it must be understood with

> reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. It is absurd to class such a miner as an independent contractor in the only sense in which that phrase is here relevant. He has no capital, no financial responsibility. He is himself dependent upon the conditions of his employment as the company fixes * * *. By him alone is carried on the company's only business; he is their "hand," if any one is. Because of the method of his pay one should not class him as though he came to do an adjunctive work, not the business of the company, something whose conduct and management they had not undertaken.

Much the same has been said in describing the conditions that must be met to impose vicarious liability under the doctrine of *respondeat superior*. See Douglas, *Vicarious Liability and Administration of Risk I*, 38 Yale L.J. 584, 597; Tiffany on *Agency* (2d ed. 1924) 102, 103–104; 2 Harper and James on *Torts* (1956) 1400; Prosser on *Torts* (2d ed. 1955) 351.

The undisputed evidence here shows that the right respondents retained to control the fishing venture, the degree of their investment, their rights to participate in the profits of the venture, and the relative permanence of their relationship with the captains are entirely inconsistent with the conclusion that the captains and crewmen are not respondents' employees:

Control. Although no written agreement specified the extent of the respondents' right of control over the activities of their captains and crewmembers (R. 66, 91, 101, 332), the potential for and the right to

control is great. Even though the sea borne nature of the activity made moment-to-moment control impossible, respondents dictated the nature of the enterprise in a less direct manner. As with any employer selecting a supervisor, respondents chose captains whose honesty, integrity, and ability they could rely upon (R. 63, 90–92, 93, 319). Thus they greatly reduced the necessity to supervise personally. They determined the type of fish to be caught (R. 57, 75, 92–93, 126–127, 156, 317), the boats to be used by each captain (R. 62, 101, 122–124, 134–135), and the general geographic areas to be fished. (R. 92–93, 151, 162, 169, 319, 321.) Further, by completely outfitting the boats, short of foul weather gear (R. 57, 112–113, 156–157, 319, 328), respondents fixed the general method used to catch and haul the fish. Respondents in addition required that no intoxicating liquors be taken aboard the boats, established restricted areas which were not to be fished, and required the captain to keep the boat clean and properly moored while in port. (R. 116–117, 124, 325.) They issued pay scales for the crews, and placed restrictions on the size of the crew to be hired. (R. 96–99, 117–118, 164, 166, 171, 189–190, 206–207, 214–215, 323.) The boat owners required the captain to prepare payroll records and to distribute bi-weekly payroll checks based on that information. (R. 164–165, 188–189, 225–226, 250, 322, 327–329.)

Respondents, moreover, retained the ultimate right of control of the activities of their fishermen. As the trial court concluded (R. 333), the owners had the right to control the results of the operation, including

the right to interfere in the process to assure a proper result from the undertaking.

The respondents possessed one of the most crucial elements in the arsenal of control, the power to terminate the captains' or crews' jobs at any time and for any reason. Respondents could discharge a captain at the conclusion of any fishing trip, and trips generally lasted but a day. (R. 63, 67, 99, 100–104, 112, 252, 299–300, 320.) One of respondents' agent and officer, Styron, testified that a captain could be brought to task for improper treatment of the boat's equipment (R. 110), and relations with the captain would be severed when his actions aboard ship endangered life or property (R. 67). The captain could be fired for failure to secure an adequate catch, or for any reason—or without reason—at the owner's sole discretion. Styron also seemed to agree that an owner could require removal of a crewman. (R. 99–100).

There were indeed activities over which respondents exercised little or no control, such as recruitment of the crew and the fishing operations at sea (R. 92, 99–102, 108, 124, 153, 162–163, 178–179, 323–324). However, the lack of control exercised over those activities was dictated by the nature of the industry and peculiar rules pertaining to its operations. As a practical matter, a boat owner who remains ashore cannot exercise actual control over the details of an operation carried on miles away. But in this respect, respondents are no different from the owners or officers of many businesses. The captains' situation is not significantly different from the authority often given a foreman in an industrial plant, or the employment office in a branch or division of a large company. The

fact that the local manager, or one of his subordinates, has power to hire and fire, and within considerable limits, to fix duties and conditions of employment does not mean that the persons hired are the manager's employees rather than those of the company—whose headquarters may, in fact, be far away. The distant owner, who is surely the employer, retains control in the same sense and through the same mechanism as respondents—by establishing general requirements, providing the facilities, and hiring competent supervisory personnel. Rev. Rul. 69-315, supra.

Investment. The investment in the fishing enterprise was entirely respondents'. They provided the costly boats, the expensive nets, and all other equipment except foul weather gear. Respondents bought the fuel and paid for all repairs. (R. 57, 65, 110, 113, 156–157, 187–188, 300–301, 319.) The captains and crew had no investment in tools and facilities. They paid for their clothing and food, but then so do almost all employees. (R. 65, 109, 328.)

Share in the profits. The captains and crews had no opportunity to share in the profit or loss of the enterprise. They were paid on a piecework basis, and the rate was fixed at the inception of a fishing season. The piecework method of payment is entirely consistent with employment. *United States* v. *Silk, supra; Schwing* v. *United States,* 165 F. 2d 518, 521 (C.A. 3); VIII Encyclopoedia of the Social Sciences (1935 ed.) 678; Treasury Regulations on Employment Tax (1954 Code), Section 31.3121(a)–1(d). The fact that the fishermen received no compensation if they returned no catch is inherent in the piecework method, and does not place them in a position of suffering an

entrepreneural loss. Piecework is not the same as sharing in the profits and losses, because it does not involve the risks and opportunities of sharing in fluctuations in the market price for menhaden during a season. Price changes left the fishermen's remuneration unaffected. The only parties who were in a position to profit from such fluctuations were respondents and the processing plants (R. 96–99, 164, 180, 187, 197, 206–207, 225, 232, 235, 323, 326.)

Permanence of relationship. Although it was not formal, the relationship between the captains and the owners manifested a high degree of permanence (R. 122, 162, 174–175, 178, 213, 221, 231, 244, 262–263). The relationships, which ranged up to 40 years (R. 174) hardly are those of independent contractors. To be sure, respondents' relation with their captains is not as clearly delineated as in land based employment. But the activities in issue here must be evaluated in the context of this particular activity. The fact that captains and crews did not work year round and were "hired" anew at the beginning of each year is not necessarily probative of an independent contractor relationship. It merely shows that menhaden fishing is a seasonal business—much like clerking in a department store before Christmas. Indeed, in *Silk* this Court held that coal unloaders who do not work regularly or continuously were employees. The rationale is that the permanence of the employment of workers must be judged in the context of the particular undertaking. Here, it was economically unfeasible to retain the services of fishermen beyond the fishing season, since they could perform no useful services after

the season's end. During the season, the owners employed the device of a bonus which, in part, guaranteed continuity of service (R. 94, 96, 132, 138–140, 144–145, 190–191, 207–208, 226, 234, 326–327). And there are suggestions in this record that respondents, in order to retain the services of captains from one season to the next, employed a system of seniority in assigning captains to vessels. (R. 134–135, 166–167, 194–195, 210–212, 227, 236, 244–246, 253–254, 263, 266.)

III. THE COURT OF APPEALS APPLIED AN ERRONEOUS STANDARD OF REVIEW

The court of appeals declined to give plenary consideration to the arguments advanced in Part II of this brief. It treated this part of the case as essentially factual in nature, even though there is not now, and there was not in trial, any material dispute with respect to the underlying facts. For the most part, the parties stipulated to them. The testimonial evidence, which serves to reinforce and flesh out the stipulation, is free of significant contradiction. Thus the case involves a dispute over the ultimate conclusions to be drawn on the basis of undisputed evidence.[14]

[14] The only factual dispute in the court of appeals was over the district court's statement that the captains owned their catch of menhaden and sold it to respondents at the prearranged rate of pay. (R. 317, 320, 325, 329.) As we pointed out in our petition (p. 5), those findings are clearly contrary to the evidence. The court of appeals appeared to have corrected that error by concluding (R. 361) that the "* * * boat owners paid the captains at an agreed price per 1,000 fish caught and delivered".

To support its conclusion that it could not review "a pure question of law" the district court's conclusion that respondents are not the employers of the captains and crewmen [redacted], the court below held (R. 365):

> * * * under the rule of *Commissioner* v. *Duberstein,* 363 U.S. 278 (1960), a tax case, a reviewing court must affirm the district court unless it can be said that its basic findings were clearly erroneous under Rule 52(a), Federal Rules of Civil Procedure. We find that there is ample evidence to support the finding of the district court. * * *

But neither of the cited authorities supports a restricted view of an appellate tribunal's function in a case of this sort. *Duberstein* did not state a standard of review applicable to every "tax case." The question was whether a certain transfer was a "gift," which Section 22(b)(3) of the Internal Revenue Code of 1939 excluded from gross income.[15] That is a problem involving to a considerable degree questions of subjective intent, and *Duberstein* itself recognizes that analogies and inferences from one tax provision to another are "dubious." 363 U.S. at 284. Here we have a statute whose language, purpose and history are entirely different from the one involved in *Duberstein,* so that the *Duberstein* decision cannot be applied here. See *United States* v. *Donruss Co.,* 393 U.S. 297, 308–309.

Rule 52(a) was also designed for other purposes. The "clearly erroneous" test applies to questions of fact which peculiarly call for determinations of credibility of witnesses, resolution of conflicting evi-

[15] Now Section 102(a) of the Internal Revenue Code of 1954.

dence, the drawing of inferences from circumstantial evidence, or the determination of state of mind or other subjective matters. These considerations would apply here only to the extent that the underlying facts are in dispute. Thus the "clearly erroneous" standard would apply in reviewing the district court's determinations of the lines of responsibility and duties and obligations entailed in the mutual relationship of owner, captains and crew. But once these matters are determined, what remains is a question of law subject to plenary review on appeal.

This case involves, to be sure, what has traditionally been called "mixed" questions of fact and law. This phrase is used to describe situations where the ultimate conclusion depends on a variety of factors, each of which may itself vary considerably from case to case. One example is a question that frequently appears in income tax litigation—the characterization of a sum of money as a debt or a contribution to the capital of a corporation. Other examples are the existence of probable cause, and the proper characterization of a railroad as "an interurban electric." [16]

All such questions involve multiple variables and there may well be confusion as to where the province of the finder of fact ends and legal analysis must begin. But this is not to say that the two functions are incapable of separation. "The history of appellate procedure shows abundantly the importance of separating the process of ascertaining the facts from ascer-

[16] See *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177; see, also, *Interstate Commerce Commission* v. *Union Pacific R.R.*, 222 U.S. 541, 547.

tainment of the applicable law and application of law to the preliminarily ascertained facts." V Pound, *Jurisprudence* (1959) 609. The desired approach was stated by Lord Mansfield in *Johnstone* v. *Sutton*, 1 T.R. 493, 545 (1786): "The question of probable cause is a mixed proposition of law and fact. Whether the circumstances * * * are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law." Far more recently, a panel of the Fifth Circuit other than the one which heard this case offered a comparable analysis of the debt-equity problem.[17] See, also, Weiner, *The Civil Nonjury Trial and the Law-Fact Distinction*, 55 Calif. L. Rev. 1020 (1967).

This is the approach that must be used here. The underlying facts—"the circumstances" to which Lord Mansfield referred—are for the trier of fact to determine. These comprise the terms and conditions, and the rights and the responsibilities, that the owners, the captains, and the crew receive or owe in relation to one another. But going beyond this determination, to the determination of the legal characterization appropriate to this bundle of rights and duties, presents a question of law. The sole question then is who, in the particular circumstances, is the employer, and that is without doubt a question of law.

This is demonstrated by *National Labor Relations Board* v. *United Insurance Co., supra.* The issue was whether "debit agents" were employees protected by the National Labor Relations Act or were instead exempted

[17] See *Berkowitz and Kolbert* v. *United States*, 69-1 CCH Tax Cases. 9398, pp. 84,634, 84,636-84,637.

"independent contractors." Although the Labor Act is phrased in different terms than the Social Security statutes, the purpose of the statute is (*id.* at 256) "to have the Board and the courts apply general agency principles"—*i.e.*, "the common-law agency test * * * in distinguishing an employee from an independent contractor." In discussing the governing standard, the Court said (*id.* at 258):

> There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor, and these cases present such a situation. * * * In such a situation as this there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles. * * *

As for the standard of review, the Court added (*id.* at 260) that the Board's conclusion that the agents were employees "was not a purely factual finding * * * but involved the application of law to facts—what do the facts establish under the common law of agency: employee or independent contractor?" [18]

The propriety of plenary review on appeal is also

[18] The Court's decision (390 U.S. at 260) to accept the National Labor Relations Board's characterization even though a court might "as an original matter, decide the case the other way" is not an application of the "clearly erroneous" standard of review. Rather, we understand this result to depend on the practice of deferring to administrative rulings in appropriate circumstances. This approach should result in reversal here (see pp. 22–23, *supra*).

demonstrated by *United States* v. *Silk, supra* and *Bartels* v. *Birmingham, supra.* In *Silk* this Court indicated that a lower court's application of the common-law tests of employment to undisputed facts is reviewable *de novo* on appeal, and reversed, as legally erroneous, the trial court's conclusion that coal unloaders were not employees for Social Security tax purposes (331 U.S. at 716–718):

> Giving full consideration to the concurrence of the two lower courts in a contrary result, we cannot agree that the unloaders in the *Silk* case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act. * * *

And in reviewing the status of members of "dance bands" for the purposes of these tax statutes, this Court again, in *Bartels,* similarly treated the issue as one fully susceptible to review by an appellate tribunal, although there the lower court's conclusion was affirmed (332 U.S. at 132).[19]

[19] In *Bartels*, this Court held that musicians in name bands which performed short-term engagements at dance halls were not employees of the dance hall operators for Social Security Act purposes, but rather were employees of the band leaders. In reaching this conclucion the Court rejected the government's argument that, whatever the practicalities of control over the musicians, the contract between the leaders and the dance hall operators expressly stated that the operators were to have complete control of the musicians and that the contract should determine the legal issue of control.

This approach is supported by statements of the Congress when it amended the Social Security Act following the decisions in *Silk* and *Bartels* (see pp. 15–16, *supra*). The Senate Report accompanying the 1948 amendments said of the "common law" rules it adopted (S. Rep. No. 1255, 80th Cong., 2d Sess., p. 7):

> * * * And properly interpreted they should resolve the conflict of lower court decisions and encourage nation-wide uniformity of application of the act.

The necessary degree of uniformity cannot be achieved if these questions are treated as solely ones of fact, committed to the judgment of the trial judge or jury. By its approach the Fifth Circuit has made it impossible to administer the Social Security and unemployment statutes in an even-handed manner. This may best be shown by cases involving shrimp fishermen in Texas. Notwithstanding the complete identity of circumstances, the result to now has depended entirely on the fortuitous factor of the judgment of the finder of fact which hears each case. Compare *United States* v. *Crawford Packing Co.*, 330 F. 2d 194 (C.A. 5), with *Jackson* v. *Phinney*, 266 F. Supp. 835 (W.D. Texas). And this was recognized by the court below, which said in its opinion (Pet. App. A, p. 8a), "* * * courts have concluded, also on facts close to this case, that the captains and deckhands were employees. *Jackson* v. *Phinney*, 266 F. Supp. 835 * * *; *Kirkconnell* v. *United States*, 347 F. 2d 260 (Ct. Claims, 1965); *Cape Shore Fishing Company* v. *United States*, 330 F. 2d 961 (Ct. Claims, 1964); *Capital*

Trawlers, Inc. v. *United States,* 324 F. 2d 506 (1st Cir., 1963)." The uniformity which Congress predicted can be achieved only if this Court declines to follow the Fifth Circuit's limited view of the scope of the appellate review in these matters. As this Court observed in *United States* v. *Mississippi Valley Co.,* 364 U.S. 520, 526, "our reliance upon the findings of fact does not preclude us from making an independent determination as to the legal conclusions and inferences which should be drawn from them."

CONCLUSION

The judgment of the court of appeals should be reversed and the cause remanded to the district court with directions to dismiss the complaints.

Respectfully submitted.

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JUNE 1969.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 3111. RATE OF TAX.

In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

(1) with respect to wages paid during the calendar years 1955 to 1959, both inclusive, the rate shall be 2 percent;

* * * * *

[26 U.S.C. (1952 ed., Supp. II) 3111.]

SEC. 3121. DEFINITIONS.

(a) *Wages.*—For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

* * * * *

(d) *Employee.*—For purposes of this chapter, the term "employee" means—

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

* * * * *

[26 U.S.C. (1952 ed., Supp. II) 3121.]

SEC. 3301. RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar

year 1955 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 percent of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306 (c)) after December 31, 1938.

* * * * *

[26 U.S.C. (1952 ed., Supp. II) 3301.]

SEC. 3306 [as amended by Sec. 1, Act of September 1, 1954, c. 1212, 68 Stat. 1130]. DEFINITIONS.

(a) *Employer.*—For purposes of this chapter, the term "employer" does not include any person unless on each of some 20 days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was 4 or more.

(b) *Wages.*—For purposes of this chapter, the term "wages means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

* * * * *

(c) *Employment.*—For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United

States, if the employee is employed on and in connection with such vessel when outside the United States, except—

* * * * *

(17) service performed by an indivdual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except—

(A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and

(B) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States).

* * * * *

(i) *Employee.*—For purposes of this chapter, the term "employee" includes an officer of a corporation, but such term does not include—

(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or

(2) any individual (except an officer of a corporation) who is not an employee under such common law rules.

* * * * *

[26 U.S.C. (1964 ed.) 3306.]

Treasury Regulations on Employment Tax (1954 Code):

§ 31.3121(a)–1 WAGES.

* * * * *

(b) The term "wages" means all remuneration for employment unless specifically ex-

cepted under section 3121 (a) (see §§ 31.3121 (a) (1)–1 to 31.3121 (a) (10)–1, inclusive) or paragraph (j) of this section.

(c) The name by which the remuneration for employment is designated is immaterial. Thus, salaries, fees, bonuses, and commissions on sales or on insurance premiums, are wages if paid as compensation for employment.

(d) Generally the basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework, or a percentage of profits; and it may be paid hourly, daily, weekly, monthly, or annually. See, however, § 31.3121 (a) (8)–1 which relates to the treatment of cash remuneration computed on a time basis for agricultural labor.

* * * * *

[26 C.F.R. 31.3121(a)–1.]

§ 31.3121(d)–1 WHO ARE EMPLOYEES.

* * * * *

(c) *Common law employees.* (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom services are performed the legal relationship of employer and employee.

(2) Generally such relationship exists when the persons for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important

factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

* * * * *

[26 C.F.R. 31.3121(d)-1.]

§ 31.3306(b)-1 WAGES.

* * * * *

(d) The basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework or a percentage of profits; and it may be paid hourly, daily, weekly, monthly, or annually.

* * * * *

[26 C.F.R. 31.3306(b)-1.]

§ 31.3306(i)-1 WHO ARE EMPLOYEES.

(a) Every individual is an employee if the relationship between him and the person for

whom he performs services is the legal relationship of employer and employee. (The word "employer" as used in this section only, notwithstanding the provisions of § 31.3306(a)-1, includes a person who employs one or more employees.)

(b) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(c) Whether the relationship of employer and employee exists will in doubtful cases be

determined upon an examination of the particular facts of each case.

(d) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(e) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

* * * * *

[26 C.F.R. 31.3306(i)-1.]

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